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(1)

No. _____

In The

Supreme Court of the United States

JOHN MASICH VUKSICH,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. The Federal Tort Claims Act is a limited waiver of sovereign immunity by the United States; excluded from this waiver are violations of federal constitutional rights. When an act of negligence by the United States is a state tort cognizable under the six step test of 28 U.S.C. 1346(b), and simultaneously a constitutional tort by the United States, does the FTCA waiver of sovereign immunity allow the courts to consider the federal question normally beyond the reach of the FTCA?

2. The 14th Amendment applies only to the actions of the state. But the involuntary transfer/deprivation of the ownership of property from one private person to another private person can only be done in a manner lawful in the eyes of the state e.g. the enforcement of a warehouse lien. Does this Court's law regarding due process "notice" under the 14th Amendment extend into an affair between private persons if the affair involves the involuntary transfer of private property, since such action must be sanctioned by the state?

3. Court of Appeals for the Fifth Circuit has deliberately ignored a judicial admission made by the United States. The District Court explicitly confirmed this judicial admission in its order on summary judgment. The Fifth Circuit's ignoring of the judicial admission is a

surreptitious reversal of that judicial admission which directly corrupts the determination of the correct private person, and thus leads to the incorrect choice of relevant law for this FTCA claim. The Appeals Court has been advised of its clear error twice by Petitioner, but denies corrective action. Has the Court of Appeals for the Fifth Circuit so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power per Rule 10?

4. There is a conflict between the Fifth Circuit and the Federal Circuit regarding the award of costs when the United States is a party in a civil action. The Fifth Circuit's model follows the Fed.R.Civ.P., presuming the prevailing party is entitled to costs; the Federal Circuit's model follows 28 U.S.C. § 2412(a)(1), the Equal Access to Justice Act, affirming there is no presumption to costs. When it is a party in a civil suit, is the United States due a presumptive entitlement to costs if it is the prevailing party?

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PETITION FOR WRIT OF CERTIORARI

Petitioner John Masich Vuksich respectfully submits this petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Court of Appeals' opinion is unpublished but reported at 2008 U.S. App LEXIS 18587 (5th Cir. Tex. Aug. 26, 2008). The order denying Vuksich's petition for panel rehearing and petition for rehearing en banc is dated October 17, 2008, unpublished and part of the docket of the Court of Appeals. The Findings of Fact and Conclusions of Law of the United States District Court for the Western District of Texas, dated January 23, 2008, are unpublished but are electronically reported in the District Court's PACER filing at DE72. The Order regarding summary judgment of the United States District Court for the Western District of Texas, dated August 31, 2007, is unpublished but is electronically reported in the District Court's PACER filing at DE44.

JURISDICTION

The District Court had jurisdiction over petitioner's claims pursuant to 28 U.S.C. § 1346(b)(1). The Court of Appeals had jurisdiction to review the district court's final judgment pursuant to 28 U.S.C. § 1291. The Court of Appeals filed its opinion on August 26, 2008. It denied Vuksich's timely petition for panel rehearing and petition for rehearing en banc on

October 17, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. 28 U.S.C. § 1346(b)(1), holds:

> Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

2. 28 U.S.C. § 2412(a)(1), the Equal Access to Justice Act (EAJA) holds in part:

> Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title, but not including the fees and expenses of attorneys, may be awarded to the prevailing party in any civil action brought by or against the United States

> or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action.

3. 28 U.S.C. § Section 2674. Liability of United States, holds in part:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

4. Defense Transportation Regulation (DTR) 4500.9-R-Part IV, C 13 holds (underlines added):

> 13. Processing NTS for Personnel Assigned PCS Overseas and Notification of Member/Employee Pending Expiration of Entitlements and Conversion of Lots to Member's/Employee's Expense.
>
> a. Upon receipt of an application for NTS, the TO will enter the estimated storage entitlement expiration date on the DD Form 1299, Block 13. This date will be determined by adding the tour length to the reporting month cited in the orders. (Exception: Flag officers have no set tour length; however, since 48 months is a common period for assignment, 48 months will be added to the month the property is placed in

storage and entered in Block 13 of the DD Form1299.)

b. Not later than 45 days before the first day of the month when the NTS entitlement is due to expire (as noted in Block 13 of the DD Form 1299), the TO will notify the member/employee by certified letter of the impending NTS entitlement expiration. A suspense date will be established for the return of information and a suspense file maintained.

c. The notification will include:

(1) Date storage entitlement will expire.

(2) Suspense date for return of information.

(3) Net weight of HHG in storage chargeable to member's/employee's JFTR/JTR weight allowance.

(4) Storage Company's name, address, service order number, and lot number.

(5) A statement that the member/employee is to reply by the suspense date whether continued storage is required. The new PCS order, personnel action, extension document, copy of separation order; or letter explaining the member's/employee's status will be provided. DOD civilian employees will provide correspondence from their Civilian Personnel Office containing the new fiscal year fund citation for continued storage. Also state, if the member/employee fails to return the letter to the TO advising of

his or her status before the date NTS entitlement is due to expire, the government's responsibility for control and payment for NTS will be terminated and the lot converted to a commercial account in the member's/employee's name at his or her expense. He or she will then be responsible directly to the commercial contractor for storage costs.

d. If the certified letter notice is not returned with notations by the established suspense date, the TO will contact the military Service/Agency personnel locator office to make a final attempt to locate the member/employee. When all notification and locator efforts have failed, the TO will take necessary steps to convert the lot to the member's/employee's expense.

5. The Code of Virginia, Section 8.7-206(1) holds:

(1) A warehouseman may on notifying the person on whose account the goods are held and any other person known to claim an interest in the goods require payment of any charges and removal of the goods from the warehouse at the termination of the period of storage fixed by the document, or, if no period is fixed, within a stated period not less than 30 days after the notification. If the goods are not removed before the date specified in the notification, the warehouseman may sell them in accordance with the provisions of the

section on enforcement of a warehouseman's lien (§ 8.7-210).

6. The Code of Virginia, Section 8.7-210 (9) holds:

> (9) The warehouseman is liable for damages caused by failure to comply with the requirements for sale under this section and, in case of willful violation, is liable for conversion.

STATEMENT

Summary of the Facts

Petitioner retired from the Army, and following his retirement bailed his household goods (effectively the entire contents of his home) to military transportation personnel. Those military transportation personnel disposed of Petitioner's property without notice. Petitioner filed a claim against the Army that was denied. During the claims process, Petitioner learned that the military transportation personnel had sent three letters of storage termination to an expired address that United States has admitted in court papers that Petitioner had properly changed. Petitioner filed suit under the FTCA claiming that the government, if a private person, violated the Code of Virginia § 8.7-206 and 8.7-210 that require "notice" prior to the termination of storage, and that define the owner's property rights in the enforcement of a warehouse lien. Throughout the proceedings, Petitioner maintained that in addition to being a state tort,

"notice" is "an elementary and fundamental requirement of due process" citing *Mullane v. Central Hanover Bank &Trust Co., 339 U.S. 306, 314 (1950)* and it progeny. At trial it was proved that the government "compounded its earlier mistakes by negligently failing to provide the Plaintiff with notice." (underline added) (See Appendix B, top of page 7) The District Court also found: "Plaintiff's complete inaction and failure to take reasonable steps to pay for the storage and recover his property" was contributory negligence. Although the state tort of negligence by the government employees was proved, Petitioner was denied judgment, the District Court ordering: "that Defendant United States is not liable under Virginia law for plaintiff John Vuksich's negligence claim due to Plaintiff's contributory negligence." Five important points flow from this paragraph:

1. Petitioner's claim of negligence by United States for failing to provide "notice", and United States' defense of contributory negligence are based in Virginia law, not upon the 14th Amendment. The District Court's finding of contributory negligence under Virginia law confirms the defendant's primary negligence, as the Virginia Supreme Court has stated: "in the absence of primary negligence by the defendant, contributory negligence cannot exist." *Andrews v. Chesapeake&Ohio Ry. Co., 184 Va. 951, 956, 37S.E.2nd 29, 31 (1946); Shumaker's Adm'x v. Atlantic Coast Line R.R. Co., 125, Va. 393, 401, 99S.E. 739, 741 (1919)* The conclusion that the negligence of United States is based in Virginia law

rather than the 14th Amendment is reinforced by the District Court's earlier order on summary judgment:

> "The undersigned does not read Vuksich's complaint to raise a separate Constitutional claim. Rather, he has clearly indentified his claim as seeking relief for the torts of negligence and conversion under the FTCA."

2. "Duty" is a necessary component of negligence. When the District Court established that United States was negligent for failing to provide notice to Petitioner under Virginia law, the District Court established United States had a duty under some Virginia law to provide that notice. The District Court did not identify the source of that duty so no measure of "manner and same extent as a private person" can be made. The failure of the District Court to identify the analogous private person was an issue on appeal.
3. The District Court affirmatively enforced Virginia's common law regarding contributory negligence to excuse the primary negligence of United States to provide notice.
4. Petitioner was denied judgment by the District Court because of the Court's finding of Petitioner's contributory negligence, and not because of any jurisdictional prohibition, specifically the jurisdictional bar that: "United States simply has not rendered itself liable under § 1346(b) for constitutional tort claims."

Federal Deposit Insurance Corp v. Meyer 510 U.S. 471.

5. The District Court simply left untouched Petitioner's claim that the state tort of "notice" simultaneously carries with it a 14th Amendment due process violation.

In addition to the claim of failure to provide notice, Petitioner claimed that the United States converted his property. In support of his claim of conversion Petitioner pointed to the Code of Virginia, Section 8.7-210 in his Complaint. That Section specifies the rights of a property owner, and defines as conversion the intentional failure of a warehouseman to comply with those rights. Although Department of Defense forms, signed by military transportation personnel and presented at trial established the violation of Petitioner's rights as owner, the District Court denied judgment to Petitioner on his claim of conversion, writing in its Findings of Fact and Conclusions of Law: "The Plaintiff presented no evidence---". (See Appendix B, top of page 9)

Petitioner's First Question

Petitioner brings to this Court a first-time situation under the FTCA where the act of negligence by employees of the United States acting within the scope of their duties is simultaneously the state tort of the failure to provide "notice", and a violation of Petitioner's 14th Amendment right to due process "notice". This case is the logical extension of *Federal Deposit Insurance Corp v. Meyer 510 U.S. 471*, from which it is commonly interpreted below

that the FTCA does not create a liability for Constitutional torts unless the conduct violates applicable state tort law. This common interpretation is untested in this Court, and the follow-on question of how the courts should address the "unless" situation of the simultaneous state and constitutional tort is unanswered.

In this case, the courts below have determined that in an FTCA action, contributory negligence can excuse a failure to provide "notice". This conclusion seems contrary to this Court's case law of *Mullane v. Central Hanover Bank &Trust Co., 339 U.S. 306, 314 (1950)* and its progeny. As stated above, the District Court found that Petitioner's "complete inaction and failure to take reasonable steps" constituted contributory negligence thus barring his recovery for United States' failure to provide notice. The excusal of United States' negligent failure to provide notice because of Petitioner's "failure to take reasonable steps" seems directly contrary to "notice" precedent established by this Court. In *Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 798 (1983)*, this Court reversed the Indiana Court of Appeals, stating: "More importantly, a party's ability to take steps to safeguard it interest does not relieve the state [the defendant] of its constitutional obligations [of notice]." As recently as April, 2006 in *Jones v. Flowers et al, No. 04-1477(U.S.S.Ct. April 26, 2006)*, this Court confirmed that principle holding:

> "None of the Commissioner's additional contentions—that notice was sent to an address Jones provided and had a legal obligation to keep updated, that a property

> owner who fails to receive a property tax bill and pay taxes is on inquiry notice that his property is subject to government taking, and that Jones was obligated to ensure that those in whose hands he left his property would alert him if was in jeopardy—relieves the State of its constitutional obligation to provide adequate notice."

Obviously the affirmed judgment of the District Court, that Petitioner's conduct can excuse the failure to provide "notice", appears contradictory to this Court's philosophy of "no-defense" for the failure to provide notice. This Court was explicit when writing in *Mullane*: that notice is "an elementary and fundamental requirement of due process in any proceeding which is to be accorded finality".

In the District Court, acting under authority of 28 U.S.C. § 1346(b)(1), the United States was proved negligent for its failure to provide "notice" as a private person under the laws of Virginia. That same act, the failure to provide "notice", but now by sovereign United States, is a constitutional tort not cognizable under 28 U.S.C. § 1346(b)(1). The Fifth Circuit wrote in its opinion in this case, and Petitioner believes this to be the law of the Fifth Circuit, that "The FTCA does not in terms create liability for conduct in violation of the Constitution; such conduct may be the basis for an FTCA claim only if the conduct violates applicable state tort law". Yet when that double-violation situation presented itself in this case, the Fifth Circuit chose to ignore the constitutional aspects of the state tort. Petitioner asks this Court to affirm the Fifth

Circuit's law that constitutional torts are cognizable under the FTCA when that tort is also an act of negligence under state law; and to command, contrary to judgments of the Fifth Circuit and the District Court, that the Constitution control over any conflict with state common law in cognizable FTCA cases.

Petitioner's Second Question

The Fifth Circuit explains its disregard for this Court's "notice" case law, writing in its opinion that: "The cases upon which Plaintiff relies all involve the constitutional due process challenges to the adequacy of notice given by the government."[1] Clearly the Fifth Circuit was seeking refuge from this Court's decisions regarding due process "notice" in the FTCA's "private person" analogy under the cloak of the non-applicability of the 14th Amendment to private individuals. And that principle is well established: "the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful." *Shelley v. Kraemer, 334 U.S. 1 (1948)* But as this Court's prior decisions make clear, the private person requirement of the FTCA does not provide a shield for the United States' failure to provide notice.

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[1] This is clear error; Petitioner/Plaintiff cited *Mullane v. Central Hanover Bank & Trust* his appeal. Kenneth Mullane and the Central Hanover Bank were both "private persons" in that most fundamental of all "notice" cases.

28 U.S.C. § Section 2674 allows that the United States shall be liable in the same manner and to the same extent as a private individual under like circumstances. This Court in *Richards v. United States, 369 U.S. 1 (1962)* held "[A] reading of the statute [FTCA] as a whole, with due regard to its purpose, requires application of the whole law of the State where the act or omission occurred". Taken together, the threshold test for holding the United States liable under the FTCA seems whether a private person could be held liable. Two prominent decisions by this Court provide affirmative examples of private persons being held accountable to other private persons because state involvement resulted in violation of plaintiff's 14th Amendment rights. As United States is being held to account as a private person, these two cases, *Shelley* and *Mullane*, provide two separate legal paths to the common conclusion that the decision of the District Court violates this Court's prior decisions and should be reversed.

Since the *Civil Rights Cases, 109 U.S. 3, 11, 17 (1883)*, this Court has decided that the 14th Amendment makes void "State action of every kind" which is inconsistent with the guaranties of the 14th Amendment, and extends to manifestation of "State authority in the shape of laws, customs, or judicial or executive proceedings." While the facts of *Shelley* regard racial discrimination, the legal analysis restates many of this Court's opinions to explain how the 14th Amendment generally becomes operative in disputes between private persons. In *Shelley*, a dispute between private non-government parties, the state action inconsistent with the guaranties of the

14th Amendment was the judicial enforcement of a private agreement that offended the equal protection clause of that amendment. In *Mullane*, this Court's bedrock "notice" case and also a dispute between private non-government parties, the state action inconsistent with the 14th Amendment was the state statute specifying the process for "notice" that failed to meet 14th Amendment standard.

In case at bar, the District Court found the United States negligent for its failure to provide notice; subsumed in that negligence finding was a finding that United States had a legal duty to provide notice. That legal duty, just as the state statute in *Mullane*, is a manifestation of "[s]tate authority in the shape of laws, customs, or judicial or executive proceedings." *Civil Rights Cases* In the words of *Mullane*: "But when notice is a person's due, process which is a mere gesture is not due process." The District Court also proved that the sending of three letters of storage termination by transportation personnel to an address properly changed by Petitioner was a breach of that duty of notice, which was due Petitioner. Such a conclusion is completely in keeping with *Robinson v. Hanrahan, 409 U.S. 38 (1972)(per curiam).* In *Mullane*, this Court condemned the conduct of the Central Hanover Bank & Trust writing: "The trustee has on its books the names and addresses of the income beneficiaries represented by appellant, and we can find no tenable ground for dispensing with a serious effort to inform them personally of the accounting, at least by ordinary mail to the record addresses." This Court held private-person Central Hanover Bank liable for its failure to provide notice sufficient to meet the

standards of the 14th Amendment. Case at bar is functionally identical to *Mullane*; private-person United States, as a bailee, should be held liable "in the same manner and to the same extent" for its failure to provide notice sufficient to meet the standards of the 14th Amendment. Thus the entire body of this Court's case law on "notice" should be operative in this case, specifically, *Mennonite Bd. of Missions* and *Jones*.

Petitioner believes that this Court's examination of United States as a private person would clarify the actual private person's constitutional duties regarding "notice". "Notice" that meets the requirement of the 14th Amendment would seem to be a requirement in any private person to private person situation that results in the involuntary transfer of property ownership, as such involuntary transfer can only be done under sanction by the state, and any such manifestation of the state must observe and enforce the guaranties of the 14th Amendment. This is not new law; *Mullane* has already established the precedent that notice is due in private-person takings.

Independent of this Court's law on notice, this Court's law on the applicability of the 14th Amendment seems operative. *Shelley* would appear to demand the reversal of the District Court's judgment. A second state action (taken by the District Court operating under Virginia laws) was the judicial enforcement of Virginia's common law contributory negligence, effectively sanctioning private-person United States' failure to provide

notice due Petitioner prior to disposal of his property. As this Court explained in *Shelley*:

> "It has been recognized that the action of state courts in enforcing a substantive common-law rule formulated by those courts, may result in the denial of rights guaranteed by the Fourteenth Amendment, even though the judicial proceedings in such cases may have been in complete accord with the most rigorous conceptions of procedural due process."

The action of the District Court, the excusal of United States' failure to provide notice because of Petitioner's contributory negligence, results in the denial of Petitioner's 14th Amendment entitlement to due process "notice". The law of this Court forbids such enforcement of common law by the District Court, and the judgment of the District Court should be reversed.

Petitioner asks this Court to affirm the principles of *Mullane* and *Shelley*. Generally, that in any situation involving the involuntary, legal and permanent transfer of the ownership of private property between private persons, the person losing ownership has a 14th Amendment right to notice that courts must enforce as the legal transfer of property can only be done under sanction by the state. And specifically to case at bar, that United States, even as a private person under the FTCA, had a 14th Amendment requirement to provide "notice" to Petitioner before it took any action regarding

Petitioner's property that was to be "accorded finality".

Petitioner's Third Question

The fundamental tenet of the appeals process is that appellate courts give deference to the findings and actions of trial courts, correcting judicial mistakes, but not substituting their own judgment. The Fifth Circuit, based only upon argument in the government's Appellee's Response, has nullified a judicial admission of the government made to the District Court, an admission confirmed by an order of the District Court. This nullification directly impacts the final decision of this case. Has the Fifth Circuit so far departed from this accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power?

Petitioner, in addition to the tort of negligence for failing to provide notice, claimed the United States was analogous to a private Virginia warehouseman, and as such would be liable for the tort of conversion-by-legal-process. The District Court ruled against Plaintiff's conversion claim writing "Plaintiff presented no evidence the Defendant took any action that was in denial of, or inconsistent with, the Plaintiff's rights as owner." Under the condition that the correct private person analogy is a Virginia warehouseman, this District Court finding is clear error. Overlooked by the District Court, but presented as early as his Complaint, Petitioner has maintained his "rights as owner" are defined in the Code of Virginia applicable to a Virginia warehouseman, specifically Sections

8.7-204, 206 and 210. Section 8.7-210 establishes that the voluntary failure of the warehouseman to comply with the provisions of that section is conversion-by-legal-process. Petitioner's evidence in the record and presented at trial are Department of Defense forms signed by transportation personnel that ordered actions not consistent with Section 8.7-210, and via interrogatory, the United States has confirmed the action was voluntary. Proof of conversion under the standards specified in Section 8.7-210(9) is met.

As conversion is an intentional tort, common law contributory negligence that might otherwise excuse the United States' primary negligence is not a defense available to the Government. Restatement (Second) of Torts § 481 (1965). The District Court's judgment should be reversed

At issue, Petitioner's claim of conversion relies upon the determination that the correct private-person analogy for this case is that of a Virginia warehouseman. While the District Court found the United States negligent for failure to provide notice, it never identified any analogous private person that explained the source of the legal duty necessary for that negligence finding. Of course a court's determination of the analogous private person, in turn, identifies the operative state law that determines liability and damages, in the instant case, the applicability of Section 8.7-210. On appeal, Petitioner asked the Fifth Circuit (as he had asked the District Court) to establish that the correct private-person analogy was that of a Virginia warehouseman, explaining that the District Court

had evaded any private person determination and that an explicit determination of the correct private individual was necessary for the establishment and extent of United States' liability.

Here is where this Court's supervisory intervention is requested. After the District Court avoided identifying its analogous private person, the Fifth Circuit declined Petitioner's request to find the Virginia warehouseman as the correct private person analogy, writing in its opinion:

> "Plaintiff has not persuaded us that a warehouseman is the appropriate "private person" analogy here. The Government never itself stored Plaintiff's belongings. Rather, the government arranged and paid for a private company to move and store Plaintiff's property as a benefit of his retirement. Plaintiff knew that a private company was providing these services. As the government explains, it was acting akin to an employer providing a relocation benefit to an employee."

This explanation by the Fifth Circuit is effectively a rewriting of the Government's argument found in the middle paragraph on page 24 of the Appellee's Response. The Fifth Circuit also derided Petitioner's assertion on appeal of conversion-by-legal-process as a "side-step" around the District Court's conclusion. But as the Fifth Circuit was informed in the petition for rehearing, Petitioner's original Complaint contained the claim of conversion under Section 8.7-210 in paragraphs 69 and 70; this is not a new argument.

The Fifth Circuit's private-person conclusion reflects the improper substitution of its facts for the District Court's facts. The facts established by the District Court demand a different conclusion. The United States told the District Court its private-person analogy, writing in its Defendant United States' Corrected Reply to Plaintiff's Response to Defendant's Cross-Motion to Dismiss:

> "A bailee is someone who by use of documentation acknowledges receipt of goods. VA Code 8.7-102(1)(a). Whereas a warehouseman is defined as one who "is engaged in the business of storing goods for hire." VA Code 8.7-102(1)(m). One can be a bailee, which the United States recognizes it is in this case, without being a warehouseman." (underline added)

This statement is deliberate, clear, and unequivocal by United States about a concrete fact within that party's knowledge; it is a judicial admission.

> "Judicial admissions are formal concessions in the pleadings, or stipulations by a party or its counsel, that are binding upon the party making them. They may not be controverted at trial or on appeal. Indeed, they are "not evidence at all but rather have the effect of withdrawing a fact from contention." Michael H. Graham, Federal Practice and Procedure: Evidence Sec. 6726 (Interim Edition); see also John William Strong, McCormick on Evidence Sec. 254, at 142 (1992). A judicial admission is conclusive, unless the court allows it to be

> withdrawn; ordinary evidentiary admissions, in contrast, may be controverted or explained by the party. Id". *Keller v. United States*, 58 F.3d 1194, 1199 n. 8 (7th Cir.1995) footnote 8.

The District Court understood the "bailee" characterization as a judicial admission, writing in its Order of 31 August 2007:

> "Second, Defendant contends that Vuksich cannot establish it exercised dominion or control over his property that had been picked up and stored by independent contractors. As Plaintiff points out, the United States has conceded it acted as a bailee in regards to his household goods. A bailment is broadly defined as "the rightful possession of goods by one who is not the owner." Further, under Virginia law, lawful possession and a duty to account for the thing as the property of another are necessary elements of bailment. Based on Defendants concession it was acting as a bailee, thus implicitly conceding the required elements of that relationship, the Court cannot conclude as a matter of law the United States did not have dominion and control over Plaintiff's property."

This "bailee" judicial admission is fully consistent with the Defense Transportation Regulation. Within the paragraph of the regulation included in the Constitutional and Statutory Provisions Involved section, the regulation explicitly states the "government's responsibility for control."

The Fifth Circuit's conclusion that "it [the government] was acting akin to an employer providing a relocation benefit" can only be made by nullifying the District Court's order recognizing the judicial admission that the correct relation is "bailee", and by ignoring the government's own regulations. The Fifth Circuit's private-person analogy is incompatible with the proved facts from the District Court as an "employer providing a relocation benefit" does not have possession (as admitted by United States as the bailee) or the duty to provide notice (a duty the District Court concluded the United States had from its negligence finding).

The Fifth Circuit was fully aware of the bailee relationship. In his Appellant's Reply, Petitioner told the Fifth Circuit that the United States was simply changing facts in its Appellee's Response, and explicitly identified and included the relevant portion of the District Court's order that cemented the "bailee" judicial admission. Petitioner also advised the Fifth Circuit panel a second time that it nullified a judicial admission and District Court order regarding "bailee" in his Petition for Panel Rehearing.

As a matter of legal process, the Fifth Circuit has abandoned the concepts of deference to the trial court and of standards of review. The standard of review of the district court's determination as to whether a particular statement constitutes a judicial admission is abuse of discretion. *MacDonald v. General Motors Corp.*, 110 F.3d 337, 340 (6th Cir.1997) No abuse of discretion has been alleged by United States and none has been found by the Fifth

Circuit. Yet the Fifth Circuit runs roughshod over the District Court's "bailee" ruling, substituting its judgment that the relation was "an employer providing a relocation benefit".

The Fifth Circuit's infidelity to the appeals process and standards of review extends to ignoring this Court's FTCA standards for the private person in "like circumstances" clearly explained in *Indian Towing Co. v. United States, 350 U.S. 61 (1955).* Quite simply, Petitioner bailed his property to the Government. From the record as a whole, the bailment was for the storage of all of Petitioner's household goods. From common knowledge, storage of household goods is normally done in a warehouse by a warehouseman. A warehouseman is a bailee for the specific function of storage. The Defense Transportation Regulation proscribes the duties to the military transportation officer regarding notice that are very similar to demands of the Virginia Code for a warehouseman (a relevant paragraph is contained within the Constitutional and Statutory Provisions Involved section earlier). These regulatory dictates far exceed the demands of what an "employer providing a relocation benefit" would provide, and this regulation is applicable as the Army Inspector General's investigation found that the transportation officer failed to comply with it. Finally, the website for the Joint Personal Property Shipping Office-Washington states: the "Mission of the Joint Personal Property Shipping Office, Washington Area is to provide services for shipment, receipt and storage of personal property." This Court warns in *Indian Towing Company* that it "must not promote profligacy by careless

construction [of the FTCA]", and on the other side of the coin this Court writes that "[n]either should it --- import immunity back into a statute designed to limit it." Petitioner's identification of the Virginia warehouseman as the correct analogous private person is harmonious with this Court's past decisions.

Yet against all this, the Fifth Circuit explains: "Under Virginia law, a "[w]arehouseman 'is a person engaged in the business of storing goods for hire.'" The Fifth Circuit's standard for "like circumstances" demands "same circumstances" which is contrary to this Court's decisions in *Indian Towing Company*, and disregards the evidence proved in the District Court.

The Fifth Circuit's determination of the correct private person is incompatible with the facts determined by the District Court, and incompatible with this Court's decisions for "like circumstances". As a result of not identifying the "warehouseman" as the correct private person, beneficial sections of Virginia law that define the property rights and conversion-by-legal-process are denied to Petitioner. 28 U.S.C. § Section 2674 demands the United States shall be liable in the same manner and to the same extent as a private individual under like circumstances, but the Fifth Circuit denies this result by injecting immunity to the United States through the private person analogy.

Petitioner's Fourth Question

There is a conflict between the Federal Circuit and the Fifth Circuit regarding the award of costs. The question presented asks if the United States, when a party in a civil action, is due a presumptive entitlement to costs, or are the award of costs to the United States only allowed by the explicit order of the court.

The Federal Circuit addressed this question in *Neal & Co., Inc. v. United States*, 36 Fed. Cl. 600 (1996), finding that the award of costs, when the United States is a party in a civil suit are governed by 28 U.S.C. 2412(a), the Equal Access to Justice Act (EAJA). The Federal Circuit concluded in *Neal & Co.*:

> In sum, EAJA does not create a presumption in favor of an award of costs to the prevailing party. Rather EAJA vests the trial court with considerable discretion to award costs. This discretion authorizes the trial court to consider a wide variety of factors, including the conduct of the parties during trial, in reaching its costs decision. See Manildra, 76 F.3d at 1183. Moreover, without a presumption in favor of a costs award, the Court of Federal Claims is under no obligation to explain a deviation from the norm. Rather a standard of wide discretion presupposes that the trial court may weigh many different factors without an explanation of its full decisional process. Indeed, the impressions created during lengthy litigation may defy accurate cataloguing. In any event, the statute envisions that the trial court may choose to award costs or not in its full

> discretion. Because the Court of Federal Claims is under no obligation to award or explain its decision not to award costs to NCI, its failure to do so cannot be considered an unusual or exceptional abuse of discretion. Therefore, this court will not overturn this exercise of discretion because of a lack of an explanation of the basis for the decision.

While this case involved the Rules of the Court of Federal Claims (RCFC) 54(d), the Federal Circuit drew heavily from the Federal Rules of Civil Procedure 54(d)(1) in its analysis. The language of the Federal Rules of Appellate Procedure (39(a) and (b)), "unless the law provides or the court orders otherwise", is functionally identical to the RCFC and Fed.R.Civ.P.

The Fifth Circuit's flagship case regarding cost is *Carlos Pacheco v. Norman Y. Mineta, etc., et al*,448 F.3d 783 (5th Cir. 2006). As the Fifth Circuit explained, *Carlos Pacheco* was a case of first impression. The analysis of the Fifth Circuit is based exclusively in the application of Fed.R.Civ.P. 54(d)(1). However overlooked from its discussion of that rule is the overriding phrase "Unless a federal statute, --- provide otherwise", and consequently, the EAJA is never mentioned or considered. The conclusion of the Fifth Circuit is that costs and fees are presumed under Fed.R.Civ.P. 54, even when the United States is a party in a civil action.

The Clerk of the Fifth Circuit prepared the mandate, and the Clerk assessed costs to Petitioner. Petitioner objected stating that the award of costs

was governed by the EAJA rather than the Fed.R.App.P. There is no presumption under the EAJA that United States is due costs, and thus the award of costs, being only at the discretion of the court, can only be awarded by an explicit order from the court. As the panel of the Fifth Circuit made no such explicit decision on costs, the Clerk is proceeding on a non-existent presumption and lacks the legal authority to tax costs. Petitioner's objection to this action by the Clerk was denied without comment by the panel.

Since the "costs" subject is raised, the Rules of the Supreme Court, Rule 43(5) explicitly address the award of costs when the United States is a party, stating the United States will pay, or will recover costs to the extent permitted by 28 U.S.C. § 2412 unless waived by the Court. This seems to be a presumption that costs are due, supporting the position of the Fifth Circuit, but also nullifying the explicit discretion given to the courts in 28 U.S.C. § 2412. This Court's adoption of the Federal Circuit's law on costs may require this Court to examine its own rules on costs when the United States is a party in a civil case.

REASONS FOR GRANTING THE PETITION

I. THE FIFTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION THAT HAS NOT BEEN, BUT SHOULD BE SETTLED BY THIS COURT. In case at bar, the Fifth Circuit, citing *Federal Deposit Ins. Corp v. Meyer, 510 U.S. 471, 478 (1994)*, wrote: "the FTCA does not in terms create liability

for conduct in violation of the Constitution; such conduct may be the basis for an FTCA claim only if the conduct violates applicable state tort law," This case tests that interpretation of *FDIC v. Meyer* for the first time in an FTCA claim in which the state tort is also a violation of the Constitution. The FTCA demands the trial be conducted under the law of the place where the act or negligence occurred; does this dictate that the Constitutional aspects of the state tort be ignored or does the Constitution take control over the law of the place in a cognizable FTCA claim?

II. THE FIFTH CIRCUIT HAS IGNORED AN IMPORTANT QUESTION, BUT THAT QUESTION SHOULD BE SETTLED BY THIS COURT. The 14th Amendment generally does not apply to private person to private person disputes; however, it can apply provided the state has had some participation in the matter. Judicial action does constitute state involvement. Can the federal courts enforce state common law e.g. contributory negligence, in an FTCA case if that enforcement results in the denial of rights guaranteed by the 14th Amendment? The implication of the answer is far broader as it would establish that 14th Amendment "notice" is required in any private person to private person when the involuntary transfer of property is concerned.

III. THE FIFTH CIRCUIT HAS SO FAR DEPARTED FROM THE ACCEPTED

AND USUAL COURSE OF JUDICIAL PROCEEDINGS, AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER. The Fifth Circuit has merely substituted its own arbitrary conclusions for that of the District Court, going so far as to ignore a judicial admission, adopt argument from the Appellee's Response as fact, overlook evidence in the record inconsistent with its views, ignore federal regulations, and disregard the concept of standards of review. While Petitioner is pro-se, his appeal to the Fifth Circuit was still entitled to the same standards of consideration as if it was presented by the most prestigious law firm. Every military officer learns very early in his training that the commander is responsible for everything the unit does or fails to do; this Court has that same responsibility for the global quality of all federal courts. If this Court tolerates shoddy work, "shoddy" will become the standard. This Court should compel the Fifth Circuit to conduct a proper consideration of Petitioner's appeal.

IV. THE DECISION BELOW CONFLICTS WITH THE FEDERAL CIRCUIT REGARDING THE PRESUMPTION THAT THE UNITED STATES, IN A CIVIL ACTION, IS ENTITLED TO COSTS. The bill of costs submitted and approved by the Clerk of the Fifth Circuit is for $67.50; real money, but not a significant amount. However, costs can become staggeringly

large, especially when fighting the unlimited resources of the federal government. This question touches every case in which the United States or one of its officers is a party, and is therefore a question properly decided by this Court. Does the EAJA establish a presumption to costs to the United States if it is the prevailing party, or was the intent of Congress to reduce the financial burden of citizens challenging their government in the courtroom by removing the presumptive entitlement to costs normally applied in cases between private persons?

CONCLUSION

Petitioner's case brings to this Court questions regarding the intersection of three independent areas of law; the FTCA, due process "notice", and the applicability of the 14th Amendment in private person situations. The FTCA is the primary waiver of sovereign immunity whereby citizens can redress torts committed by government employees. Refinement of ambiguities and the harmonization with other areas of law is important as the FTCA can affect many citizens. Separately, a question of costs is presented when the United States is a party in a civil suit. The presumption that costs are due, or not due, to the United States when it is a party in a civil suit can involve enormous sums of money and effect many citizens. These issues seem central to the role of this Court.

The issue most important to Petitioner is the one of least importance to the mission of this Court. Petitioner prays this Court will correct the injustice done to him by his government with the disposal of his home. Petitioner simply asks that the United States be held responsible for its actions as allowed under the FTCA.

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted.

8 Jan 2009

John M. Vuksich, pro se

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED

August 26, 2008
Charles R. Fulbruge III
Clerk

JOHN M VUKSICH
Plaintiff-Appellant

v.

UNITED STATES OF AMERICA
Defendant-Appellee

No. 08-50240
Summary Calendar

Appeal from the United States District Court For the Western District of Texas
USDC No. 1: 07-CV-233

Before HIGGINBOTHAM, BARKSDALE, and ELROD, Circuit Judges.

PER CURIAM:*

This appeal brings to us a retired military man's Federal Tort Claims Act suit against the Government. The inexplicable failings of both parties to use reasonable care led to Plaintiff's personal

* Pursuant to *5TH CIR. R. 47.5*, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in *5TH CIR. R. 47.5.4*.

belongings being auctioned by a private storage company to satisfy outstanding storage fees. After a bench trial, the district court entered a take nothing judgment. We affirm.

I

John Vuksich (Plaintiff) retired from the Army in June 1993. He was entitled to have the Army pay for one year of storage for his belongings, and he was also entitled to have the Army pay to ship his belongings within a year. The authorized period expired on June 3, 1994. Although the storage entitlement could not be extended, Plaintiff could request up to five one-year extensions of the shipping benefit. Plaintiff testified that he "knew that the first one year was paid for by the government. And [he] knew that after that one year, storage could continue on [his] nickel." Plaintiff's belongings were moved and stored by a private company.

Plaintiff duly requested the extension of the shipping entitlement during the following years. In several of the letters advising Plaintiff that his shipping entitlement had been extended, the Government reminded Plaintiff that the storage entitlement was not subject to extension, that it expired a year after his retirement, and that Plaintiff "must contact the Transportation Office(s) which is storing your property to arrange payment of storage costs." Plaintiff, however, neither contacted the Transportation Office nor paid the storage fees. In April 1999, the Government sent Plaintiff a letter reminding him that his "FINAL request" for extension of the shipping entitlement had been granted, and that the extension ran until 30 June 1999. The letter contained the same advisements regarding the storage entitlement. Plaintiff, however,

made no effort to arrange for shipment of his goods or to pay the storage fees.

As the district court explained in its findings of fact and conclusions of law, "the Plaintiff had been aware since June 14, 1997, at the latest, of the possibility that a failure to follow the conditions of his storage entitlement and agreement could 'result in the commercial company holding a public auction of [his] goods.'" Plaintiff was also warned in March 1998 that failure to take delivery of his goods before the expiration of the shipping entitlement would lead to his shipment being converted to a commercial account.

In 2000, 2001, and 2002, the Government sent Plaintiff letters concerning the storage of his goods; however, the letters were sent to an old address. Plaintiff had notified the Government of a change of address and provided the correct address, but for some reason the computer system was never updated. The Government also provided the private storage company with an incorrect address for Plaintiff, the effect of which was that Plaintiff never received the correspondence from the storage company informing him that it was going to auction off his belongings to pay for outstanding storage fees. Plaintiff's belongings were auctioned in November 2004. A person who had bought some of Plaintiff's belongings at the auction contacted him because he wanted to return some of Plaintiff's personal effects.

Plaintiff unsuccessfully sought compensation from the Army through administrative channels. He then sued the Government under the Federal Tort Claims Act, alleging negligence and conversation under Virginia law. The district court held a bench trial. The court concluded that the Government was negligent, but that Plaintiff was also at fault.

Because Virginia maintained the affirmative defense of contributory negligence, the court held that Plaintiff's negligence barred recovery. As to conversion, the court concluded that Plaintiff failed to carry his burden of proof as he "presented no evidence the [Government] took any action that was in denial of, or inconsistent with, the Plaintiff's rights as owner." Finally, even assuming that he had proved liability, the court concluded that Plaintiff "failed to prove by a preponderance of the evidence what, if any, amount of damages he should receive." Plaintiff appeals.

II

"'The standard of review for a bench trial is well established: findings of fact are reviewed for clear error and legal issues are reviewed *de novo*.'"[1] "'A factual finding is not clearly erroneous as long as it is plausible in the light of the record read as a whole.'"[2]

III

A

Plaintiff's first assignment of error is unclear. The argument revolves around notice and due process. While Plaintiff tells us that he is not pursuing a constitutional claim under the guise of the FTCA, we cannot understand the argument as anything but an assertion that the district court erred because the "notice" provided by the Government to Plaintiff fell short of what the *Due Process Clause* requires. This may be so, but "[t]he FTCA does not in terms create liability for conduct in violation of the Constitution;

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[1] *Water Craft Mgmt. LLC v. Mercury Marine, 457 F.3d 484, 488 (5th Cir. 2006)*(quoting *In re Mid-South Towing Co., 418 F.3d 526, 531 (5th Cir. 2005)*).

[2] *Walker v. City of Mesquite, 402 F.3d 532, 535 (5th Cir. 2005)* (quoting *United States v. Cluck, 143 F.3d 174, 180 (5th Cir. 1998)*).

such conduct may be the basis for an FTCA claim *only if the conduct violates applicable state tort law* and if the suit is not barred by some federal limitation upon FTCA liability."[3] The cases upon which Plaintiff relies all involve constitutional due process challenges to the adequacy of notice given by the government.[4] Plaintiff complains that the district court analyzed the Government's actions like a mine-run tort, but that, of course, is what the FTCA contemplates. As the Supreme Court has explained, under the FTCA, "the United States waives sovereign immunity 'under circumstances'

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[3] R. Fallon, et al., Hart & Wechsler's The Federal Courts and the Federal System 968 (5th ed. 2003); *see Federal Deposit Ins. Corp. v. Meyer, 510 U.S. 471, 478, 114 S. Ct. 996, 127 L. Ed. 2d 308 (1994)* ("Indeed, [HN4] we have consistently held that *§ 1346(b)*'s reference to the 'law of the place' means law of the State--the source of substantive liability under the FTCA."); *Sanchez v. Rowe, 870 F.2d 291 (5th Cir.1989)* ("We agree . . . that suits for violations of federal constitutional rights, even though tortious in nature, are not within the scope of the FTCA. Because '[b]y definition constitutional torts are not based on state law,' the FTCA does not provide a cause of action for constitutional torts." (quoting *McCollum v. Bolger, 794 F.2d 602, 608 (11th Cir. 1986)*)).

[4] *See Jones v. Flowers, 547 U.S. 220 (2006)* (due process challenge to the steps taken by the state to provide delinquent tax payer notice of tax sale); *Dusenbery v. United States, 534 U.S. 161, 122 S. Ct. 694, 151 L. Ed. 2d 597 (2002)* (due process challenge to the sufficiency of notice given to a prisoner of the Government's intent to forfeit his property); *Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 103 S. Ct. 2706, 77 L. Ed. 2d 180 (1983)* (due process challenge to the sufficiency of notice provided to a delinquent tax payer prior to tax sale of property); *Robinson v. Hanrahan, 409 U.S. 38, 93 S. Ct. 30, 34 L. Ed. 2d 47 (1972)* (per curiam) (due process challenge to the sufficiency of notice provided to a prisoner of state forfeiture proceedings).

where local law would make a 'private person' liable in tort."[5]

B

Plaintiff next attacks the district court's contributory negligence finding. Plaintiff does not argue that contributory negligence is not the law of Virginia or that it is not a complete bar to recovery. Instead, he contests the district court's application of the doctrine. Plaintiff has shown no reversible error.

As the Virginia Supreme Court has explained, "Contributory negligence is an affirmative defense that must be proved according to an objective standard whether the plaintiff failed to act as a reasonable person would have acted for his own safety under the circumstances. The essential concept of contributory negligence is carelessness."[6] "Contributory negligence consists of the independent elements of negligence and proximate causation."[7] "Negligence of the parties may not be compared, and any negligence of a plaintiff which is a proximate cause of the accident will bar a recovery."[8] Proving contributory negligence is the defendant's burden, and it is generally a question of fact.[9]

The district court found that "[a]s a result of the Plaintiff's complete inaction and failure to take reasonable steps to pay for the storage and recover his property, the Court finds by a preponderance of the evidence the Plaintiff was negligent and his

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[5] *United States v. Olson, 546 U.S. 43, 44 (2005).*

[6] *Jenkins v. Pyles, 269 Va. 383, 611 S.E.2d 404, 407 (Va. 2005)* (citations omitted).

[7] *Estate of Moses v. Sw. Va. Transit Mgmt. Co. Inc., 273 Va. 672, 643 S.E.2d 156, 160 (Va. 2007).*

[8] *Litchford v. Hancock, 232 Va. 496, 352 S.E.2d 335, 337, 3 Va. Law Rep. 1685 (Va. 1987).*

[9] *Sawyer v. Comerci, 264 Va. 68, 563 S.E.2d 748, 752 (Va. 2002).*

negligence was a proximate cause of his damages." The record adequately supports this finding. Plaintiff admitted in his testimony that he knew he was responsible for paying storage costs after the first year, and the Government reminded him of this several times between 1994 and 1999 and told him to contact the transportation office to arrange for payment. Plaintiff was unambiguously told that his shipping entitlement expired on June 30, 1999, and could not again be extended. As Plaintiff testified, "I knew that the shipping was over. I knew that the storage funded by the government had been over for years. The situation in my life said I don't need the property now. . . . The property's in D.C. Leave it all alone and live your life that you need over here. So I had no requirement for the property."

And as the district court noted, "the Plaintiff had been aware since June 14, 1997, at the latest, of the possibility that a failure to follow the conditions of his storage entitlement and agreement could 'result in the commercial company holding a public auction of [his] goods.'" Despite Plaintiff's admitted knowledge that he was responsible for the storage costs after the first year, and the Government's repeated advisements, Plaintiff took no step to pay for the storage, to contact the Government about the storage, to arrange for the shipment of his goods, to contact the storage company after his shipping entitlement ended, to pay the storage company after the shipping entitlement ended, or anything else for that matter. In short, the record amply supports the district court's conclusion that Plaintiff failed to act as a reasonable person would to safeguard his property, and that those failings were a proximate cause of his injury.

C

Plaintiff next contends that the district court erred in finding that he failed to prove that the Government converted his property. The Virginia Supreme Court has explained that "[c]onversion is a tort involving injury to property, in which one wrongfully exercises or assumes authority over another's goods, depriving him of their possession. Conversion includes any distinct act of dominion wrongfully exerted over property that is in denial of, or inconsistent with, the owner's rights."[10]

The district court concluded that evidence at trial demonstrated that the private storage company was the entity responsible for auctioning Plaintiff's property, and that "Plaintiff presented no evidence the Defendant took any action that was in denial of, or inconsistent with, the Plaintiff's rights as owner." The record amply supports these conclusions. We see no evidence that the Government was aware of or in involved with, let alone authorized, the auctioning of Plaintiff's goods. When the Government extricated itself from the storage and shipping of Plaintiff's belongings, it did not interfere with Plaintiff's rights or wrongfully exercise authority or control over Plaintiff's property. The property remained Plaintiff's at that time, and Plaintiff knew where his property was and that he was responsible for paying the costs of storage. To the extent Plaintiff intends to challenge this finding, he has shown no error.

Plaintiff tries to sidestep this conclusion by arguing that the district court erred by not treating the Government as a warehouseman under Virginia law, which matters, Plaintiff says, because of some of the statutory provisions applicable to

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[10] *Hartzell Fan, Inc. v. Waco, Inc., 256 Va. 294, 505 S.E.2d 196, 201 (Va. 1998).*

warehouseman.[11] "The [FTCA] makes the United States liable 'in the same manner and to the same extent as a private individual under *like circumstances.*' As th[e] Court said in *Indian Towing,* the words 'like circumstances' do not restrict a court's inquiry to the *same circumstances,* but require it to look further afield."[12] Under Virginia law, a "[w]arehouseman' is a person engaged in the business of storing goods for hire."[13]

Plaintiff has not persuaded us that a warehouseman is the appropriate "private individual" analogy here. The Government never itself stored Plaintiff's belongings. Rather, the Government arranged and paid for a private company to move and store Plaintiff's property as a benefit after his retirement. Plaintiff knew that a private company was providing these services. As the Government explains, it was acting akin to an employer providing a relocation benefit to an employee. On the record we find before us, we agree with the Government. Plaintiff has shown no reversible error.

III

Because Plaintiff has shown no reversible error in the district court's contributory negligence or conversion determinations, we have no occasion to consider the parties' damages arguments.

The judgment of the district court is AFFIRMED.

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[11] *See Va. Code Ann. §§ 8.7-204, 8.7-210.*

[12] *Olson, 546 U.S. at 46* (citing *28 U.S.C. § 2674; Indian Towing Co. v. United States, 350 U.S. 61, 76 S. Ct. 122, 100 L. Ed. 48 (1955))* (citations omitted).

[13] *Va. Code Ann. § 8.7-102(m).*

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JOHN MASICH VUKSICH,
Plaintiff,

-vs- **Case No. A-07-CA-233-SS**

UNITED STATES OF AMERICA,
Defendant,

FINDINGS OF FACT AND CONCLUSIONS OF LAW

BEITREMEMBERED on this 27th day of December 2008,the Court called the above-styled cause for a bench trial on the merits. Having considered the evidence and testimony at the trial on the merits, both parties' additional briefing, the relevant law, and the case file as a whole, the Court now enters the following opinion and orders.

Findings of Fact

Plaintiff John Masich Vuksich retired from the United States Army in July 1993. On July 1, 1993, Plaintiff signed a DD Form 1299 Application for Shipment and/or Storage of Personal Property. Tr. Ex. #1 at 3. By signing, Plaintiff certified he read and

understood his shipping responsibilities and the storage conditions printed on the reverse side of the form. *Id.* The reverse side of the form stated in relevant part, "I understand the Government will not be responsible for goods remaining in storage after the expiration of the authorized period." *Id.* at 4. Based on his military service, the Plaintiff was entitled to one year of free storage of his goods and one year within which to have his goods shipped at government expense. The authorized period was listed as expiring on June 3, 1994. *Id.* at 3. The storage entitlement could not be extended, but the Plaintiff could request up to five one year extensions of the shipping benefit. The Plaintiff agreed he would be responsible for the cost of any storage beyond the one year storage entitlement.

Plaintiff requested extensions of his shipping entitlement on several occasions. In response to each of those requests, Plaintiff received a letter from the United States informing him that his storage entitlement could not be extended and it had expired 12 months after his date of retirement. Each letter further informed Plaintiff that his shipping entitlement would be extended for one more year. *See* Tr. Ex. #8, /#11, #14. In, each letter the Plaintiff was instructed to contact the Transportation Office(s) which is storing your property to arrange payment of storage cost". *Id.* The Plaintiff made no effort at any time to pay for the accrued storage fees. On April 1, 1999, Plaintiff was sent a letter from the Joint Personal Property Shipping Office of the Army regarding his "**FINAL** request" for an extension of his shipping entitlement. Tr. Ex. #15. This letter informed Plaintiff his storage entitlement had ended 12 months after his date of retirement, but approved

Plaintiffs "**FINAL**" request, extending his shipping entitlement until 30 June 1999." *Id.* The letter states it should be retained by you and presented to the transportation office at the time you request shipment of your personal property, but no later than 30 June 1999." *Id.*

From April 1, 1999 until November 2004, Plaintiff took no action to retrieve his goods, pay for the storage of his goods, or arrange for shipment of his goods. The Joint Personal Property Shipping Office of the Army sent Plaintiff three letters dated November 17, 2000, December 26, 2001, and April 8, 2002, regarding the location and expiration of storage of his household goods. Tr. Ex. #39. Unfortunately, these three letters were all sent to Plaintiff at an inactive address in Arlington, Virginia. The United States admits it had been given notice of Plaintiff's proper address and that the letters were sent to the old address because the new address was never added to the computer system. The United States also admits it failed to send the Plaintiff s proper address to the private shipping and storage company used to store his property, Bekins A- 1 Movers, Inc. ("Bekins"). 'I'he failure to properly update the Plaintiff's address resulted in his not receiving specific notice his property was going to be sold and his personal property was eventually sold by Bekins at action in 2004. However, the Plaintiff had been aware since June 14, 1997, at the latest, of the possibility that a failure to follow the conditions of his storage entitlement and agreement could "result in the commercial company holding a public auction of (his) goods." Tr. Ex. #10.

The Plaintiff's Claims

The Plaintiff brings suit against the United States of America pursuant to the Federal Tort Claims Act (FTCA") for negligence and conversion. He claims the United States was negligent in the following acts or omissions: (1) the United States did not exercise reasonable care as a warehouseman under Virginia Code 8.7-204; (2) the United States did not provide notice to Plaintiff prior to the termination of storage of his goods as a warehouseman under Virginia Code 8.7-206; (3) the United States negligently failed to update Plaintiff's address in their database; (4) the United States negligently failed to comply with the notice procedures of DOD Regulation 4500.9R, Part IV requiring the use of certified mail; (5) the United States negligently failed to comply with the procedures for the sale of property required by Virginia Code 8.7-210; (6)the United States negligently provided an incorrect address to Bekins when it transferred Plaintiffs property to Bekins' control. Compl. at 9-13. Plaintiff also asserts a claim for conversion against the United States. *Id.* at 10-11. Plaintiff seeks $102,982 in damages, an order that the United States replace certain items of property of trivial monetary value, costs, and attorney's fees.

Analysis

I. Applicable Law

The FTCA waives the United States' sovereign immunity for injuries or loss of property "caused by the negligent or wrongful act or omission of any employee" of the United States acting in the course and scope of his duties. 28 U.S.C. 1346(b); *Metro. Life Ins. Co. v. Atkins*, 225 F.3d 510, 512 (5th Cir. 2000). Under the FTCA, the United States is liable in

damages to the same extent a private person would be liable for the same negligent act or omission under the law of the state in which the act or omission occurred, 28 U.S.C. 1346(b); *United States v. Olson*, 546 U.S. 43, 46-47 (2005); *Skipper v. United States*, 1 F.3d 349, 352 (5th Cir. 1993). Thus, the law of the state where the negligent act or omission occurs determines liability. *Tindall v. United States*, 901 F.2d 53, 55 (5th Cir. 1990).

The acts or omissions at issue in this case occurred in Virginia, thus the Court will apply Virginia law to determine liability. To prove negligence under Virginia law, a plaintiff must prove four elements by a preponderance of the evidence: 1) the defendant owed the plaintiff legal duty; 2)the defendant breached that duty; 3)the plaintiff suffered some injury; and 4) the plaintiff's injury was proximately caused by the defendant's breach. *Talley v. DanekMedical Inc.*, 179 F.3d 154, 157 (4thCir. 1999). Furthermore, Virginia is one of the states which has retained the affirmative defense of contributory negligence. *Virginia&MarylandR.R. Co. v. White*, 228 Va. 140, 145, 319 S.E.2d 755, 758 (1984). Under Virginia law, negligence of the parties may not be compared, and any negligence of a plaintiff which is a proximate cause of the accident will bar recovery. *Fein v. Wade*, 191 Va. 203,210, 61 S.E.2d 29, 32 (1950). As an affirmative defense, the defendant has the burden at trial of proving by a preponderance of the evidence "that the plaintiff was negligent and that his negligence proximately caused his injuries." *Virginia&Maryland R.R. Co.*, 140 Va. at 145, 319 S.E.2d at 752.

Conversion under Virginia Law requires the Plaintiff to prove by a preponderance of the evidence

that the Defendant wrongfully exercised or assumed authority over the Plaintiff's goods, depriving him of their possession. *Hartzell Fan, Inc. v. Waco, Inc.*, 136 Va.294, 301-02, 505 S.E.2d 196, 201 (Va. 1998); *Hairston Motor Co. v. Newsome*, 253 Va. 129, 135, 480 S.E.2d 741, 744 (1997). Conversion includes any distinct act of dominion wrongfully exerted over property that is in denial of, or inconsistent with, the owner's rights. *Universal C.I.T. Credit Corp. v. Kaplan*, 198 Va. 67, 76, 92 S.E.2d 359, 365 (1956).

II. Negligence

The government acted inexcusably. The government failed in its duty to the Plaintiff and to the public at large in its conduct of providing services to our armed service men and women. On July 1, 1994, the United States should have started collecting the cost of storing the Plaintiff's goods from him on a regular basis. Instead, the government chose to do as little as possible, chose the course of action which required the least effort, by ambiguously reminding the Plaintiff of his responsibility to eventually pay for his storage while continuing to pay Plaintiff's storage expenses with taxpayer funds. Neither side presented evidence of the total cost of storing Plaintiff's goods with a private company for an entire decade-the Court would not be surprised if the government to this day does not know this entire figure-however, it was no small sum. For years, the government never enforced or attempted to enforce its own agreement and regulations. The government, in effect, invited and certainly allowed Plaintiff to abuse his original storage entitlement. Years later, when the government finally decided to take action, it

compounded its earlier mistakes by negligently failing to provide the Plaintiff with notice. The Defendant sent correspondence to the Plaintiffs correct address in Austin, Texas as early as July 12, 1996 and as recently as April 1, 1999. Tr. Ex. #8, #16. Yet, inexplicably, the Defendant sent all three notices of "storage expiration" on November 17, 2000, December 26, 2001, and April 8, 2002, to the Plaintiff's prior address in Virginia rather than his address in Texas. Tr. Ex. #39. The Defendant also negligently failed to provide the private storage and moving company with the Plaintiff s correct address. As a result, the Plaintiff never received specific notice from the Defendant or Bekins that his goods would be sold at a public auction. In fact, the Plaintiff received no notice of the sale until a good Samaritan who had purchased some of the Plaintiff's personal memorabilia at the auction contacted him to offer to return it.

The government argued it should not be held liable for its actions because it provided the storage/shipping entitlement gratuitously and therefore it owed the Plaintiff no duty to act with reasonable care. The Court finds this argument offensive in addition to unpersuasive. The United States government is not to provide free storage and shipping when not so authorized. Rather, the men and women who qualify for entitlements pay for it with years of service to this country. It is no more a gratuity than the wages, pensions, and health care that members of the military earn with their service. As a result, the government owed the Plaintiff a duty of care and, in this case, breached that duty.

However, while the Defendant breached its duty of care, the Plaintiff is not without fault of his

own. From the beginning, the Plaintiff knew his rights and responsibilities. The Plaintiff knew he was responsible for paying the cost of storage after the first year and was repeatedly reminded between 1994 and 1999 to "contact the Transportation Office(s) which is storing your property to arrange payment of storage cost" Tr. Ex. #8, //11, #14. The Plaintiff never made any effort at any time to contact Bekins and/or pay the costs of his storage. The Plaintiff knew his shipping entitlement expired on June 30, 1999 and was obligated to request shipping of his property no later than that date. Tr. Ex. #15. Despite that knowledge, for five years the Plaintiff took no action whatsoever to pay for the storage costs and reclaim his property between June 30, 1999 and when his property was sold at auction in 2004. If the Plaintiff had made or attempted to make arrangements for his property, there would be no issue for this Court today. As a result of the Plaintiff's complete inaction and failure to take reasonable steps to pay for the storage and recover his property, the Court finds by a preponderance of the evidence the Plaintiff was negligent and his negligence was a proximate cause of his damages. Thus, under Virginia law the Plaintiff's contributory negligence completely bars any recovery for the Defendant's negligence. *Fein v. Wade*, 191 Va. 203, 210, 61 S.E.2d 29, 32 (1950).[1]

III. Conversion

[1] Had Virginia law not retained contributory negligence as a complete defense and the Court determined the comparative negligence of the parties, the Court would have found the Plaintiff sixty percent at fault and the Defendant forty percent at fault and entered the same take nothing judgment.

The Court finds the Defendant never wrongfully exercised or assumed authority over the Plaintiff's goods and/or depriving him of their possession. *Hartzell Fan, Inc. v. Waco, Inc.*, 256 Va. 294, 301-02, 505 S.E.2d 196, 201 (Va. 1998); *Hairston Motor Co. v. Newsome*, 253 Va. 129, 135, 480 S.E.2d 741, 744 (1997). The Plaintiff presented no evidence the Defendant took any action that was in denial of, or inconsistent with, the Plaintiff's rights as owner. *Universal C.L.T. Credit Corp. v. Kaplan*, 198 Va. 67, 76, 92 S.E.2d 359, 365 (1956). As the evidence presented at trial established, the United States government did not sell the Plaintiffs property at auction. A private storage and moving company, Bekins A-1 Movers, Inc., made the decision to sell the Plaintiff's property and conducted the public auction. Bekins is not a party to this suit. The Plaintiff was aware his property was held by a private company and there was no evidence that the auction was conducted at the Defendant's direction or request. Plaintiff's deliberate inattention and failure to communicate with Bekins and pay his debt was sufficient reason for Bekins to sell the property. The Plaintiff failed to prove by a preponderance of the evidence that the United States converted his property.

IV. Damages

Even if the evidence had established the Defendant's liability, the Plaintiff failed to prove by a preponderance of the evidence what, if any, amount of damages he should receive. According to the Plaintiff's own "Damages Supplement," evidence was presented of "three independent paths to damages." Pl's Damages Supplement [#71] at 2. No competent

evidence was presented by either side as to which, if any, "path to damages" the Court should follow. The two specific numbers suggested by the Plaintiff vary by over $40,000, and, for the third path, the Plaintiff asks the Court to somehow divine "the actual value" of the property to him. Based on the total lack of evidence presented at trial, the Court could not find any specific damages in this case by a preponderance of the evidence.

Conclusion

In accordance with the foregoing:

IT IS ORDERED that the Defendant United States is not liable under Virginia law for Plaintiff John Vuksich's negligence claim due to the Plaintiff's contributory negligence. The Plaintiff shall take nothing from the Defendant in this cause.

IT IS FURTHER ORDERED that the Defendant is not liable under Virginia law for the Plaintiff's conversion claim because the Plaintiff failed to prove by a preponderance of the evidence that the Defendant wrongfully exercised or assumed authority over the Plaintiff's goods, depriving him of their possession. The Plaintiff shall take nothing from the Defendant in this cause.

IT IS FURTHER ORDERED that the Plaintiff failed to prove by a preponderance of the evidence the amount of damages to which he would be entitled if the Defendant had been liable.

IT IS FINALLY ORDERED that all pending motions are DISMISSED AS MOOT.

SIGNED this 23rd day of January 2008.

/S/
SAM SPARKS
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JOHN MASICH VUKSICH,
Plaintiff,

-vs- **Case No. A-07-CA-233-SS**

UNITED STATES OF AMERICA,
Defendant,

ORDER

Before the Court are Plaintiff's Motion for Summary Judgment, filed April 17,, 2007 [#4]; Defendant United States' Response to Plaintiff's Motion for Summary Judgment and Cross-Motion to Dismiss for Failure to State a Claim Upon Which Relief Could be Granted, filed April 30, 2007 [#5]; Reply to Defendant United States Response to Plaintiff's Request for Summary Judgment, filed May 3, 2007 [#8]; Defendant United States' Reply to Plaintiff's Response to Defendant's Cross-Motion to Dismiss, filed May 8, 2007 [#9]; Defendant United States' Corrected Reply to Plaintiff's Response to Defendant's Cross-Motion to Dismiss, filed May 9, 2007 [#11]; Plaintiff's Motion to Strike Defendant United States' Corrected Reply to Plaintiff's Response to Defendant's Cross-Motion to Dismiss,

filed May 11, 2007 [#15]; Defendant United States' Reply to Plaintiff's Motion to Strike, filed May 16, 2007 [#17]; Advisory to the Court by Defendant United States, filed May 24, 2007 [#20]; Plaintiff's Response to United States Summary Judgment Motion (per this Court's 14 May 2007 Order), filed June 4, 2007 [#27]; Plaintiff's Motion for Leave to File Supplemental Pleading, filed June 25, 2007 [#30]; Defendant United States' Response to Plaintiff's Supplemental Pleading, filed July 5, 2007 [#34]; Plaintiff's Motion for Reconsideration of This Court's Denial of the Availability of Rule 56 to Plaintiff, filed July 6, 2007 [#37];', Motion to Strike Plaintiff's Motion for Reconsideration of Court's Denial of the Availability of Rule 56 to Plaintiff, filed July 16, 2007 [#38]; and Plaintiff's Response to United States Motion to Strike Plaintiff's Motion for Reconsideration of Court's Denial of the Availability of Rule 56 to Plaintiff, filed July 24, 2007 [#40].

Having considered the motions, responses and replies thereto, the case file as a whole and the applicable law, the Court enters the following opinion and orders.

I. Background

Plaintiff John Masich Vuksich ("Vuksich") filed this action against Defendant the United States of America ("United States"). He seeks monetary relief for the loss of various household and personal property left in the custody of the United States. Vuksich invokes the jurisdiction of this Court pursuant to the Federal Tort Claims Act ("FTCA").

The parties have now filed motions and pleadings seeking a variety of relief. The pleadings

fall into three broad categories. Each category will be addressed in turn.

II. Motions to Strike/Supplement Pleadings

Plaintiff has filed two pleadings in which he seeks to strike or supplement other pleadings. In the first of these Plaintiff has moved to strike the United States' Corrected Reply to his response to Defendant's dispositive motion. He objects to the reply on the basis it raises new arguments not asserted by Defendant in the dispositive motion itself.

Plaintiff has also moved to supplement his pleadings. He seeks leave to assed what he terms affirmative defenses to the allegations of contributory negligence and absence of duty raised by the United States in its answer. According to Vuksich, he could not have anticipated these issues would be asserted by Defendant and thus could not and did not raise them in his original complaint. The United States objects to Plaintiff's motion for leave to file a supplemental pleading, arguing his requested supplementation is nothing more than additional summary judgment arguments.

The Court notes neither party has identified any prejudice which would result from consideration of the matters raised in the proposed pleadings. Further, the parties have, since the filing of the motions, both taken the opportunity to respond to the new issues and arguments raised in the objected-to pleadings. Accordingly, the undersigned concludes the additional pleadings should be permitted.

III. Plaintiff's Motion for Reconsideration

Plaintiff has also filed a motion in which he seeks "Reconsideration of This Court's Denial of the Availability of Rule 56 to Plaintiff." Defendant, in turn, has filed a motion to strike Plaintiff's motion. Defendant also requests the Court enter an order prohibiting Plaintiff from filing additional pleadings addressing issues not yet raised, raising arguments which should have been raised before, or rehashing arguments already raised.

As an initial matter, the Court notes no order addressing the merits of Plaintiff's motion for summary judgment had been issued at the time he sought "reconsideration." Thus, any argument by Vuksich that the Court should "reconsider" a "denial" of the availability of Rule 56 of the Federal Rules of Civil Procedure is, on its face, meritless. Moreover, despite the title of Plaintiff's motion, his motion appears to be an attempt to urge the Court into a prompt ruling on his summary judgment motion and a reiterated explanation of his belief as to the merits of the motion. The undersigned reminds Vuksich he chose to file his motion for summary judgment at a very early stage in the litigation, roughly two weeks after service of process was executed on Defendant. In subsequent pleadings, the last of which was filed June 4, 2007, Plaintiff filed additional summary judgment evidence for the Court's consideration. Any attempt by Vuksich to accelerate consideration of his summary judgment motion was clearly impeded by his own actions and is additionally an improper interference in the Court's management of its own docket.

The Court is not, however, inclined to grant Defendant's motion to strike the motion or to prevent

Plaintiff from filing additional pleadings. His pro se status is entitled to some deference. See *Haines v. Kerner*, 404 U.S. 519, 520-21, 92 S. Ct. 594, 596 (1972) (pro se pleadings entitled to liberal construction). Moreover, his actions have not yet risen to the level meriting the imposition of sanctions. Accordingly, the relief sought by both parties is properly denied.

IV. Motions for Summary Judgment

Both Plaintiff and Defendant have filed motions for summary judgment.[1] Plaintiff contends Defendant agreed to act as a bailee of his household goods and: (1) was negligent in so doing by failing to maintain his proper address, failing to notify him of the storage termination, and disposing of his goods without proper notice; and further (2) allowed his goods to be converted. Defendant argues summary judgment is proper as to Plaintiff's claims because: (1) the United States owed no duty to Plaintiff for his stored goods after June 1999 and had no duty to notify Plaintiff before the sale of his goods; (2) Vuksich's contributory negligence bars any recovery; (3) any recovery is barred by the applicable Army regulations; (4) any due process claim fails as a matter of law; and (5) Plaintiff cannot recover on his conversion claim.

A. Standard of Review

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[1] Defendant originally moved to dismiss Plaintiff's action for failure to state a claim. Based on Defendant's reliance on matters outside the pleadings the Court, upon notification to the parties, converted the motion to one seeking summary judgment.

Summary judgment is appropriate under Rule 56(c) of the Federal Rules of Civil Procedure only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). A dispute is genuine only if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254, 106 S. Ct. 2505, 2513 (1986).

The party moving for summary judgment bears the initial burden of "informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrates the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553 (1986). The burden then shifts to the nonmoving party to establish the existence of a genuine issue for trial. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 585-87, 106 S. Ct. 1348, 1355-56 (1986); *Wise v. E.I. Dupont de Nemours & Co.*, 58 F.3d 193, 195 (5th Cir. 1995). The non-movant must respond to the motion by setting forth particular facts indicating there is a genuine issue for trial. *Mississippi River Basin Alliance v. Westphal*, 730 F.3d 170, 174 (5th Cir. 2000). "After the non-movant has been given the opportunity to raise a genuine factual issue, if no reasonable juror could find for the non-movant, summary judgment will be granted." Id.

The parties may satisfy their respective burdens by tendering depositions, affidavits or other competent evidence. *Topalian v. Ehrman*, 954 F.2d

1125, 1131 (5th Cir. 1992). Unsubstantiated or conclusory assertions, improbable inferences, and unsupported speculation are not competent summary judgment evidence and thus are insufficient to defeat a motion for summary judgment. *Eason v. Thaler*, 73 F.3d 1322, 1325 (5th Cir. 1996),' *Forsyth v. Barr*, 19 F.3d 1527, 1533 (5th Cir 1994).

B. Applicable Law

The FTCA waives the United States' sovereign immunity for injuries or loss of property "caused by the negligent or wrongful act or omission of any employee" of the United States acting in the course and scope of his duties. 28 U.S.C. 1346(b); *Metro. Life Ins. Co. v. Atkins*, 225 F.3d 510, 512 (5th Cir. 2000). Under the FTCA, the United States is liable in damages to the same extent a private person would be liable for the same negligent act or omission under the law of the state in which the act or omission occurred. 28 U.S.C. 1346(b); *United States v. Olson*, 546 U.S. 43, , 126 S. Ct. 510, 513 (2005); *Skipper v. United States*, 1 F.3d 349, 352 (5th Cir. 1993).
Thus, the law of the state where the negligent act or omission occurs determines liability. *Tindall v. United States*, 901 F.2d 53, 55 (5th Cir. 1990).

C. Relevant Facts

Plaintiff was an officer in the United States Army beginning in 1973. (Plf. Mot/for Summ.
Jt. Aff. of John M. Vuksich ("Vuksich Aff.") p1). He requested and was granted retirement from active duty, effective June 10, 1993. (Id. p3). On July 1, 1993 Plaintiff applied to the Joint Personal Property

Shipping Office-Washington ("JPPSO-W") for the storage and subsequent shipment of his goods. (Id. p4 & Att. F). Army regulations entitled Vuksich to one year of storage of his household goods at government expense. He was further entitled to shipping of his household goods at government expense for up to six years, with the proper authorization.[2] His household goods were packed and taken to storage in Virginia on July 19 and 20, 1993. (Id. p4 & Att. G).

The summary judgment evidence shows Plaintiff wrote a letter to JPPSO-W on May3, 1996 letter, with a return address in Austin, Texas. In the letter, Vuksich requested an extension of his authorization "to move my household goods to my retirement location, and to keep my household goods in non-temporary storage at the government rate." (Id. p13 & Att. M at 6). Plaintiff received a letter dated July 12, 1996 letter, sent to his Austin address, from the Department of the Army. The letter stated Vuksich's request for an extension of shipping entitlement was approved, but noted storage at government expense could not be extended beyond the initial one year entitlement. The letter further advised Plaintiff, if he had goods in non temporary storage, "you must contact the Transportation Office(s) which is storing your property to arrange payment of storage costs." (Id. p14 & Att. N at 5). Plaintiff sent substantially similar letters, all with a return address in Austin, to the Army on March 3, 1997, May 28, 1997, April 24, 1998, March 22, 1999 and June 10, 1999. (Id. p13 & Att. M at 1-5). The

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[2] Although neither party has presented summary judgment evidence or citation to legal authority on the issue, they appear to be in agreement as to the effect of the applicable regulations.

Army sent similar responsive letters, also all to Vuksich's Austin address, on June 19, 1997 and May 8, 1998, approving Plaintiff's request for extension of his shipping entitlement. (Id. p14 & Att. N at 2 & 4). The Army finally sent a letter dated April 1, 1999 to Plaintiff's Austin address, with a subject line of "Final Retirement Request,' approving Vuksich's final request for an extension of his shipping entitlement, noting the entitlement could be granted only for a total of six years. (Id. p14 & Att. N at 1).

JPPSO-W then sent three storage termination letters to Plaintiff, dated November 17, 2000, Decemberz6, 2001 and April 8, 2002. The letters informed Vuksich of the expiration of the storage of his household goods being held in Non-Temporary Storage. Plaintiff was told to contact the local transportation office concerning the matter. The letters further stated the failure to do so may result in converting the storage cost to his personal expense for any period beyond the original expiration date. Each of these letters was addressed to Plaintiff at an address in Arlington, Virginia. None were received by Vuksich. (Id. pp17-18 & Att. I & J).

JPPSO-W completed a Service Order for Personal Property, addressed to Bekins A-1 Movers, Inc. ("Bekins"), advising Bekins Plaintiff's property was being converted to "MBR Expense" on July 30, 2002. The Service Order listed Vuksich's permanent address as located in Arlington, Virginia. (Id. pp19-20 & Att. O). According to Plaintiff, he became aware in November 2004 that his personal property had been auctioned. (Compl. p35). He was unsuccessful in his attempts to recover the property or to obtain monetary relief from Defendant. (Id. pp36-53). Vuksich then instituted this action alleging

negligence and conversion of goods on the pad of Defendant. (Id. p54-85).

D. Analysis

Both Plaintiff and Defendant contend they are entitled to summary judgment as to Plaintiff's claims of negligence. Vuksich asserts the United States was negligent in failing to update his address, in failing to comply with the notice provisions of the applicable regulations by not sending notices to him by certified mail, in failing to comply with the notice provisions of Virginia law concerning the sale of his goods and in failing to provide his correct address to Bekins in July 2002. Defendant does not dispute its failure to use Plaintiff's Austin address or provide the address to Bekins, nor the failure to send the notices to him by certified mail. Rather, the United States argues Plaintiff has failed to meet his burden in moving for summary judgment and further argues its conduct does not entitle Vuksich to recover on his claims of negligence and Defendant should thus be granted summary judgment.

To prove negligence under Virginia law, a plaintiff must (1) identify a legal duty. of the defendant to the plaintiff, (2) a breach of that duty, and (3) injury to the plaintiff (4) proximately caused bythe breach. *Talley v. Danek Medical Inc.*, 179 F.3d 154, 157 (4th Cir. 1999). Defendant first argues it owed no duty to Plaintiff for his stored goods after June 1999. In support, the United States points to a provision in what appears to be the back of one of the pages of the Application for Shipment And/or Storage of Personal Property (Application") completed by

Plaintiff on July 1, j . l 1993. (Vuksich Aff. p4 & Att. F at 4). The provision states:

> [i]n consideration of said household goods or mobile homes being shipped at Government expense, I hereby agree that . . . I understand the Government will not be responsible for goods remaining in storage after the expiration of the authorized period.

(Id.). According to the United States, the effect of this provision is to terminate any duty it may have had as to Plaintiff's household goods as of June 3, 1994.[3]

In response Plaintiff argues the responsibilities of the parties concerning his household goods are not governed solely by the Application. As he points out, 37 U.S.C. 406, governing travel and transportation allowances for members of uniformed service, and 5 U.S.C. 5726, governing storage expenses for household goods and personal effects of government employees, plus various military regulations, are all at play in the matter. He further argues Defendant's storage of his household goods fell within the ambit of Virginia law governing the conduct of warehousemen. See VA. CODEANN 8.7-204 (duty of care imposed on warehouseman), 8.7-206 (process for termination of storage at warehouseman's option) & 8.7-210 (enforcement of warehouseman's lien) (2004).

Moreover, other language in the Application appears somewhat inconsistent with Defendant's

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[3] The application lists this as the date Plaintiffs entitlement to storage at government expense expired. (Id. at 1).

assertion of no duty, specifically the provision stating:

> When the household goods are stored in Government Facilities and the authorized period for storage at Government expense expires, the Government may require me to remove the household goods from their place of storage. In the event, after 30 days notice, I fail to remove the household goods or if, after diligent effort, notice to me can not be affected, the Government may proceed as follows: (a) Place and store the household goods, in commercial storage at my expense, or (b) if a commercial warehouse will not accept the household goods for commercial storage at my expense, the Government is hereby authorized to take whatever action in accordance with law and regulation may be deemed appropriate to effect disposition of the household goods.

(Vuksich p114 & Att. F at 4). This provision clearly places a burden on the Government to notify the person storing goods of the need to remove them and further outlines a process which must be followed should notice not be affected. Both of these duties would only arise after the expiration of the authorized period of storage.

In addition, the course of conduct of the parties after June 1994 appears inconsistent with Defendant's claim to have no responsibility for Plaintiff's goods. The Department of the Army continued to correspond with Vuksich concerning his goods for some five years after the expiration of the authorized period of storage. Although the letters from the Army reiterated Plaintiff's entitlement to storage at government expense was not extendable,

he was told only to contact the transportation office to pay for the storage, no indication was given as to what would happen to his property if he did not. (Vuksich Aff. p14 & Att. N at 1). Further, notably absent from the letters November 2000 through April 2002, sent to Plaintiff's out-dated Virginia address, is any indication of the Army's intent to dispose of Plaintiff's goods should he fail to contact the transportation office. (Id. p17 & Att. I & J). The Court thus declines to conclude Defendant has established as a matter of law it owed no duty to Plaintiff as to his household goods after June 1994.

Both Defendant and Plaintiff contend they are entitled to summary judgment based on the negligence of the other. According to Vuksich, the United States' failure to comply with the duties of a warehouseman under Virginia law by failing to ensure he was properly notified prior to disposal of his goods constitutes negligence as a matter of aw. Defendant maintains it was not acting as a warehouseman and was thus not derelict in any duties. Similarly, Defendant argues Plaintiff's failure to pay for the storage of his goods and failure to remain in contact with the Department of the Army concerning those goods constitutes contributory negligence barring him from recovery. Vuksich points out the Army instructed him in its April 1, 1999 letter he merely needed to contact the transportation office to arrange for payment "'for any outstanding charges prior to delivery out" and was thus not acting unreasonably. (Vuksich Aff. p14 & Att. N at 1).

A determination of the parties' negligence is not a proper subject for a motion for summary judgment. Under Virginal law, negligence of the

parties may not be compared, and any negligence of a plaintiff which is a proximate cause of the accident will bar a recovery. *Fein v. Wade*, 191 Va. 203, 210, 61 S.E.2d 29, 32 (1950). Contributory negligence and proximate cause ordinarily are factual issues for resolution by the fact finder. *Litchford v. Hancock* 232 Va. 496, 499, 352 S.E.2d 335, 337 (Va. 1987). These issues become matters of law for decision by a court only when reasonable minds could not differ about the conclusion to be drawn from the evidence. *Va. & Md. R.R. Co. v. White*, 228 Va. 140, 144-45, 319 S.E.2d 755, 758 (1984). The undersigned does not find the facts in this case are such that reasonable minds could not differ. Accordingly, neither party is entitled to summary judgment on this basis.

Defendant also argues any recovery is barred by the applicable Army regulations. The regulation cited by the United States provides "property damaged or lost, in whole or in part, as a result of any negligence of wrongful act of the claimant . . . is not compensable." Army Regulation 27-20 p11-6(g) (Def. Reply Att.1). The Court has already determined the issue of Plaintiff's negligence is not properly determinable at this time. Accordingly, the United States is not entitled to summary judgment on this basis.

Defendant has also moved for summary judgment as to Plaintiff's asserted violation of the Fourteenth Amendment. The undersigned does not read Vuksich's complaint to raise a separate Constitutional claim. Rather, he has clearly identified his claims as seeking relief for the torts of

negligence and conversion under the FTCA.[4] Accordingly, Defendant's motion on this point is unnecessary.

Finally, Plaintiff has also asserted a claim for conversion. Conversion under Virginia law is the wrongful exercise or assumption of authority over another's goods, depriving him of their possession. *Hartzell Fan, Inc. v. Waco, Inc.*, 256 Va. 294, 301-02, 505S.E.2d 196, 201 (Va. 1998); *Hairston Motor Co. v. Newsome*, 253 Va. 129, 135, 480 S.E.2d 741, 744 (1997). Conversion includes any distinct act of dominion wrongfully exerted over property that is in denial of, or inconsistent with, the owner's rights. *Universal C.I.T. Credit Crop. v. Kaplan*, 198 VA. 67, 76, 92 S.E.2d 359, 365 (1956).

The United States maintains Plaintiff cannot recover on his conversion claim for two reasons. First, Defendant argues conversion is an intentional tort to which the FTCA does not apply. The government is correct that the FTCA specifically excludes from its ambit a variety of intentional torts, including claims "arising Out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." 28 U.S.C. 2680(h). The statutory exception does not, however, include conversion. See Rodriguez-Rodriguez v. United States, 4 Fed. Appx. 637, 639 (10th Cir. 2001) (conversion claims permitted under

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[4] In his summary judgment motion Plaintiff does identify the Due Process Clause of the Fourteenth Amendment as part of the law governing his claim. However, constitutional claims are not cognizable under the FTCA. *F.D.I.C. v. Meyer*, 510 U.S. 471 , 477, 114 S. Ct. 996, 1001 (1994).

the FTCA; *Preston v. United States*, 696 F.2d 528, 542 (7thCir. 1982) (finding government liable for conversion under FTCA; *Nottingham, Ltd. v. United States*, 741 F. Supp. 1445, 1447 (C.D. Cal. 1989) (concluding action for conversion under California law did not fall within exception to FTCA'S waiver of sovereign immunity). Summary judgment is not, therefore, proper on this basis.

Second, Defendant contends Vuksich cannot establish it exercised dominion or control over his property because the property had been picked up and stored by independent contractors. As Plaintiff points out, the United States has conceded it acted as a bailee in regards to his household goods. A bailment is broadly defined as "the rightful possession of goods by one who is not the owner" *K-B Corp. v. Gallagher*, 218 Va. 381, 384, 237 S.E.2d 183, 185 (Va. 1977). See also *Stevenson v. Jones*, 142 Va. 391, 393, 128 S.E. 568, 569-70 (1925) (holding conversion occurred when bailee transferred stock she was holding to one to whom stock did not belong). Further, under Virginia law, lawful possession and a duty to account for the thing as the property of another are necessary elements of a bailment. *Otto Wolff Handelsgesellschaft, mbH v. Sheridan Transp.Co.*, 800 F. Supp. 1359, 1366 (E.D. Va. 1992). Based on Defendant's concession it was acting as a bailee, thus implicitly conceding the required elements of that relationship, the Court cannot conclude as a matter of law the United States did not have dominion or control over Plaintiff's property. Summary judgment for Defendant as to Plaintiff's claim of conversion is thus denied.

In accordance with the foregoing:

IT IS ORDERED that Plaintiff's Motion to Strike Defendant United States' Corrected Reply to Plaintiff's Response to Defendant's Cross-Motion to Dismiss [#15] is DENIED;
IT IS FURTHER ORDERED that Plaintiff's Motion for Leave to File Supplemental Pleading [#30] is GRANTED;
IT IS FURTHER ORDERED that Plaintiff's Motion for Reconsideration of This Court's Denial of the Availability of Rule 56 to Plaintiff [#37] is DENIED.
IT IS FURTHER ORDERED that Defendant's Motion to Strike Plaintiff's Motion for Reconsideration of Court's Denial of the Availability of Rule 56 to Plaintiff [#38] is DENIED;
IT IS FURTHER ORDERED that Plaintiff's Motion for summary Judgment [#4] is DENIED;
IT IS FURTHER ORDERED that Defendant United States' Cross-Motion to Dismiss for Failure to State a Claim Upon Which Relief Could be Granted, construed as a motion for summary judgment, [#5] is DENIED.

SIGNED this 31st day of August 2007.

_____ /s/_____
SAM SPARKS
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 08-50240

U.S. COURT OF APPEALS
FILED
OCT 17 2008
CHARLES R. FULBRUGE III
CLERK

JOHN M VUKSICH
Plaintiff-Appellant
v.
UNITED STATES OF AMERICA
Defendant-Appellee

Appeal from the United States District Court For the Western District of Texas

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ON PETITION FOR REHEARING AND REHEARING EN BANC

(Opinion 8/26/08, 5 Cir., _____, _____ F.3d _____)

Before HIGGINBOTHAM, BARKSDALE,
and ELROD, Circuit Judges.
PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (Fed. R. App. P. and 5th Cir. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor, (Fed. R. App. P. and 5th Cir. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges who are in regular active service and not disqualified not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT

/s/ Higginbotham
United States Circuit Judge

REHG-4A